



U.S. Citizenship  
and Immigration  
Services

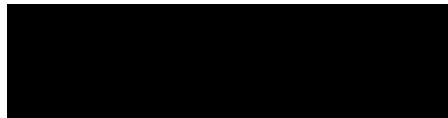
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FILE: EAC 02 088 53811 Office: VERMONT SERVICE CENTER

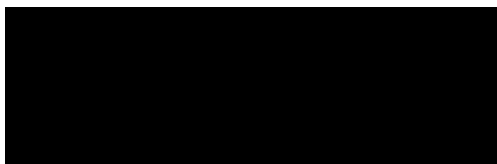
Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*[Handwritten signature]*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant established in 1949. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel argues that the director erred in finding that the petitioner does not have the ability to pay the beneficiary's offered salary.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

At issue in this case is whether the petitioner has established its ability to pay the beneficiary's offered wage as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is February 14, 2001. The beneficiary's salary as stated on the approved labor certification is \$11.47 per hour or \$23,857.60 annually.

Labor certification in this case was granted by the Department of Labor on December 16, 2001; the petition was filed on January 15, 2002. The petitioner is organized as a corporation. As evidence of its ability to pay, the petitioner submitted a copy of its 2000 Form 1120, U.S. Corporation Income Tax Return. Submission of the 2000 Form 1120 is understandable since, as of January 15, 2002, the petitioner more than likely would not yet have filed its 2001 Form 1120 with the Internal Revenue Service. The 2000 return indicates that the petitioner's taxable income before net operating loss deduction (NOL) and special deductions was -\$8,681. Schedule L of this return shows that the petitioner had \$39,519 in current assets and \$13,042 in current liabilities, resulting in net current assets of \$26,477.

On February 28, 2002, the director requested additional evidence relevant to the petitioner's ability to pay the offered wage. The director did not request submission of the petitioner's 2001 Form 1120. In response, the

petitioner submitted copies of income statements for the months ending December 31, 2001 and March 31, 2002, a balance sheet for the period ending December 31, 2001, copies of two checking account statements for the period from February 1, 2002 until March 29, 2002, a copy of the beneficiary's 2001 W-2, Wage and Tax Statement, and a copy of the beneficiary's paycheck, dated April 3, 2002.

The director denied the petition. He determined that the petitioner had not established its ability to pay the beneficiary's proffered wage based on the petitioner's negative taxable income as shown on its 2000 tax return, that the petitioner's internally generated financial statements had little evidentiary value as they were based solely on the petitioner's management's representations, and that the beneficiary had only been paid \$12,525.88 during 2001.

Although some of the director's factual observations are accurate, we cannot concur with his decision. As noted above, the petitioner reported \$26,477 in net current assets in 2000. This amount would be sufficient to cover the beneficiary's offered salary of \$23,857.60. Whether the beneficiary actually was employed at this rate in 2001 is not currently at issue; the petitioner's ability to pay the salary was adequately set forth on the 2000 federal tax return in conformance with regulatory requirements.

Accordingly, we conclude that the petitioner has established that it had the ability to pay the beneficiary's wage as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained.